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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

On a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department.

BRIEF OF RESPONDENTS

J. RAYMOND HANNON,
Corporation Counsel,
Attorney for Respondents,
City Hall,
Yonkers, N. Y.

JOHN PRESTON PHILLIPS,
Of Counsel for Respondents,
30 South Broadway,
Yonkers, N. Y.

INDEX

PAGE

Opinions of the Court Below 1

Statement of Judicial Proceedings in New York Courts 1

Question Presented 3

Argument 4

Point I—Acts of Board of Education in granting or refusing to grant permission for the use of a schoolhouse out of hours are discretionary 4

Point II—Respondents were not required to serve and file an answer to petition 5

Point III—Petition does not state facts to establish that respondents have failed to perform a duty specifically enjoined by law and does not show a clear legal right of the petitioner to the relief demanded 7

Conclusion 8

PAGE

Table of Cases Cited

Cannon v. Towner, 188 Misc. 955 5

High v. Board of Education, 169 Misc. 98, aff'd 256 App. Div. 1074, aff'd 281 N. Y. 815 5

Hubert Work, Secretary of Interior v. United States on the Relation of Logan Rives, 267 U. S. 175 8

Hubert Work, Secretary of the Interior v. United States, ex rel., Chestatee Pyrites & Chemical Corporation, 267 U. S. 185 8

In re Donovan, et al., 65 N. Y. S. 2d 437 7

In re Poland Milk Producers Cooperative Ass'n., Inc., et al., 62 N. Y. S. 2d 794 7

Matter of Burr v. Voorhis, 229 N. Y. 382 7

Matter of Colonial Beacon Oil Co., Inc. v. Finn, 245 App. Div. 382 7

Matter of Fahey v. Wright, 256 App. Div. 474 8

Matter of Friedman v. Roseth Corporation, et al., 271 App. Div. 870 6

Matter of Magnotta v. Gerlach, 301 N. Y. 143, 149 ... 5

Matter of Mulry v. Beckman, 274 App. Div. 780 8

Roy v. Board of Education, 106 N. Y. S. 2d 451 8

Statutes Cited

Education Law of the State of New York, Section 414 4

Education Law of the State of New York, Section 2112 4

New York Civil Practice Act, Section 1291 5

New York Civil Practice Act, Section 1293 2

New York Civil Practice Act, Article 78 2

Other Authorities Cited

Appeal of American Civil Liberties Union, 36 (N. Y.) State Department Reports 476 5

Matter of Vernon High School Alumni Association, 15 (N. Y.) State Department Reports 476 5

Matter of Women's Civic Club of Katonah, Inc., 32 (N. Y.) State Department Reports 396 4

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BRIEF OF RESPONDENTS

Opinions of the Courts Below.

The opinion and order of the Supreme Court, Westchester County appear at pages 3, 4, 14 to 19 of the Record. The opinion is reported in 118 N. Y. S. 2d 815 and is not officially reported. The opinion of the Appellate Division of the Supreme Court, Second Department, is reported in 281 App. Div. 987.

Statement of Judicial Proceedings in New York Courts.

This proceeding was instituted by petitioner, on or about the 9th day of December, 1952, for an order, pursuant

to Article 78 of the New York Civil Practice Act, directing the respondents to grant to the petitioner's organization the use of a schoolhouse in Yonkers for the purpose of a forum for the discussion of peace and war. In the petition to the Supreme Court of the State of New York, County of Westchester (R., fols. 15-35), petitioner alleges that he is president of the Yonkers Committee for Peace, an unincorporated association, formed among residents of the City of Yonkers and of Westchester County for the object of arranging forums for the discussion of problems relating to peace against war (R., fols. 16-20); that on May 14th, 1952 (R., fol. 22) and on October 21st, 1952 (R., fol. 28) he made application to the respondents for permission to use the auditorium of one of the schools for the purpose of a forum for the discussion of peace and war and that the respondents denied such permission (R., fols. 23-29). In paragraph 2 of the petition (R., fols. 16-21) a statement of the purposes of petitioner's organization is set forth. Petitioner further alleges that respondents did not inform him of the reason for the denial of his application (R., fol. 32); that respondents are concealing a design to discriminate against him and his organization and that the acts of respondents are arbitrary and unreasonable (R., fol. 33) and violate the right of petitioner and constituent members of his organization of freedom of speech and assembly guaranteed by the Constitution of the United States and deny them the equal protection of the laws in violation of the Constitution of the United States (R., fol. 34).

Respondents, pursuant to the provisions of section 1293 of the New York Civil Practice Act, moved to dismiss the petition as a matter of law upon the ground that the petition is insufficient in law in that it does not state facts to constitute grounds for the relief sought therein; that the petition fails to show a clear legal right of petitioner to the relief demanded or to any relief on the merits; that

the petition does not state facts to establish that the respondents failed to perform a duty specifically enjoined upon them by law, and that the refusal of respondents to grant permission to petitioner's organization could be adequately reviewed by an appeal to the Commissioner of Education of the State of New York (R., fols. 36-39).

After argument at a Special Term of the Supreme Court of the State of New York, the Court denied the application and dismissed the petition on the ground that the procedure under Article 78 of the Civil Practice Act was not available to petitioner and that the exclusive remedy was by an appeal to the Commissioner of Education. The opinion of the Court is set forth in full at pages 14-19 of the Record.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, the Court unanimously affirmed the order of the Court below and held that the proceeding was properly before the Court but that the petition did not allege facts which established a clear legal right to the relief sought nor which established that respondents failed to perform a duty enjoined by law (*In the Matter of James R. Ellis, as President of the Yonkers Committee for Peace, an Unincorporated Association, Appellant* against *William Dixon, et al., as Members of the Board of Education of the City of Yonkers, Respondents*, 281 App. Div. 987).

A motion for leave to appeal to the Court of Appeals was denied by the Appellate Division of the Supreme Court of the State of New York, Second Department (R., fols. 58-62), and by the Court of Appeals (R., fols. 64-67).

Question Presented.

Does the exercise of the discretion vested in them under the provisions of section 414 of the Education Law of the State of New York by respondents in refusing to grant petitioner and his organization the right to use a school

auditorium for the purpose of holding a forum for the discussion of war and peace abridge petitioner's freedom of assembly and freedom of speech in contravention to the First and Fourteenth Amendments to the Constitution of the United States?

ARGUMENT

POINT I.

Acts of a Board of Education in granting or refusing to grant permission for the use of a schoolhouse out of hours are discretionary.

Section 414 of the Education Law of the State of New York which is set forth in full in Appendix B, pages 39-41 of petitioner's brief, vests in the trustees or board of education of a school district the discretionary power to permit the use of a schoolhouse and grounds outside of school hours for any of the purposes set forth in said section.

As pointed out by the Court at Special Term (R., fols. 44-48) such power is discretionary and the courts will not interfere with this discretion unless the action of the board is essentially arbitrary.

A member of a board of education is a public officer and must reside in the school district in which he serves. Upon removal from the district his office becomes vacant (Section 2112 of the Education Law of the State of New York). Without doubt members of a board in a school district know the sentiment of the taxpayers and voters of the school district in which they serve and, as pointed out by the Court (R., fols. 45-46), may find, even if the proposed use is in itself legitimate, that the sentiment of the community is divided as to the propriety of the use and may properly refuse a request, the granting of which would result in dissatisfaction and criticism (*Matter of*

Women's Civic Club of Katonah, Inc., 32 State Dept. Rep. 396, 397; *Matter of Vernon High School Alumni Association*, 15 State Dept. Rep. 476; *Appeal of American Civil Liberties Union*, 36 State Dept. Rep. 476). See also *Cannon* v. *Towner*, 188 Misc. 955.

It cannot be assumed that the respondents have been arbitrary in denying the use of the school to petitioner's organization. On the contrary it must be assumed that they acted honestly and in accordance with law (*Matter of Magnotta* v. *Gerlach*, 301 N. Y. 143, 149).

The exercise of the discretion vested in respondents by section 414 of the Education Law did not abridge petitioner's freedom of assembly and freedom of speech in contravention to the First and Fourteenth Amendments to the Constitution of the United States.

POINT II.

Respondents were not required to serve and file an answer to the petition.

At page 9 of petitioner's brief it is stated that "The respondents did not file an answer as required by Section 1291, Civil Practice Act of New York, and therefore the allegations of the petition must be deemed admitted (Section 1291)."

Apparently petitioner overlooked the provisions of Section 1293 of the Civil Practice Act which provides that a respondent may apply on the return day for an order dismissing the petition as a matter of law. This is the procedure followed by the respondents in this proceeding. For the purposes of such a cross motion to dismiss all the allegations of the petition are deemed to be true (*High* v. *Board of Education*, 169 Misc. 98, aff'd 256 App. Div. 1074, aff'd 281 N. Y. 815).

Section 1293 provides that "In the event of the denial of such application, the court may permit the respondent

to answer, upon such terms as may be just" (*Matter of Friedman* v. *Roseth Corporation, et al.*, 271 App. Div. 870).

In paragraph 15 of the petition (R., fols. 30-31) petitioner alleges that the respondents and their predecessors, as members of the Board of Education of the City of Yonkers "adopted regulations for the use of schoolhouses, grounds or other property when not in use for school purposes whereby organizations at all times herein mentioned were and are permitted the use of school buildings when not in use." Nowhere in the petition is the name of any organization to whom such permission was granted set forth. The records relating to the issuance of such permits are public records and could have been inspected by petitioner. In the following paragraph of the petition (R., fols. 31-32) petitioner alleges that "the school buildings, grounds and property of and in the City of Yonkers have on numerous occasions * * * been permitted to be used pursuant to Section 414 of the Education Law by organizations for the purpose of public assembly and discussion". Such an allegation, it is respectfully submitted, is a conclusion and may not be held, even if deemed admitted by respondents' failure to answer the petition, to show that, in denying petitioner's organization the use of a school building, respondents were arbitrary or to show that there has been discrimination against petitioner's organization.

Had the Court in this proceeding denied respondents' cross motion to dismiss the petition as a matter of law it could have granted leave to the respondents to answer the petition in which event proper denials and affirmative defenses setting forth the specific reasons why they refused to grant to the petitioner's organization the use of a school building for a forum for the discussion of peace and war could have been interposed by respondents. Such answer could properly set forth the names of all organizations who have been granted permission to use schoolhouses and school grounds and the purposes for which they were used.

A question of fact would thus be raised and the Court could, upon proper proof, determine whether respondents, in refusing to grant petitioner and his organization the right to use a school auditorium for the purpose of holding a forum for the discussion of war and peace, abridged petitioner's freedom of assembly and freedom of speech in contravention to the First and Fourteenth Amendments of the Constitution of the United States, and whether petitioner's organization has been discriminated against.

POINT III.

Petition does not state facts to establish that respondents have failed to perform a duty specifically enjoined by law and does not show a clear legal right of petitioner to the relief demanded.

The Appellate Division, in affirming the order of Special Term, held that the petition does not allege facts which establish a clear legal right to the relief sought nor which establish that respondents failed to perform a duty enjoined by law (Appendix A, p. 39, of petitioner's brief).

To compel the issuance of a permit for the use of school property petitioner must show that the duty of respondents to issue such permit is positive and not discretionary.

> *Matter of Burr* v. *Voorhis,* 229 N. Y. 382;
> *Matter of Colonial Beacon Oil Co., Inc.* v. *Finn,* 245 App. Div. 382.

It is likewise incumbent on petitioner to show that he has a clear legal right to the relief sought in a proceeding under Article 78 of the New York Civil Practice Act.

> ***In re Donovan, et al.,*** 65 N. Y. S. 2d 437 (not officially reported);
> ***In re Poland Milk Producers Cooperative Ass'n., Inc., et al.,*** 62 N. Y. S. 2d 794 (not officially reported);

Matter of Fahey v. *Wright*, 256 App. Div. 474;
Matter of Mulry v. *Beckman*, 272 App. Div. 780;
Roy v. *Board of Education*, 106 N. Y. S. 2d 451 (not officially reported).

Mandamus cannot be used to compel or control a duty by an officer in the discharge of which, by law, he is given discretion.

Hubert Work, Secretary of Interior v. *United State on the Relation of Logan Rives*, 267 U. S. 175;
Hubert Work, Secretary of Interior v. *United States, ex rel., Chestatee Pyrites & Chemical Corporation*, 267 U. S. 185.

Conclusion.

The order below should be affirmed or, if reversed, this Court, it is respectfully submitted, should remand the proceeding to the Court below to make an order denying respondents' motion to dismiss the petition as a matter of law with leave to the respondents to answer, upon such terms as may be just.

Respectfully submitted,

J. Raymond Hannon,
Corporation Counsel of the City of Yonkers and Attorney for Respondents,

John Preston Phillips,
Of Counsel for Respondents.